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No. 82-151

In the
Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 710 PENSION FUND, ET AL.,
Petitioners,

v.

WILLIAM R. JANOWSKI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER, IN AN ACTION FOR BREACH OF FIDUCIARY DUTIES UNDER ERISA, PLAN PARTICIPANTS HAVE STANDING TO CHALLENGE A PLAN PROVISION WHICH HAS BEEN JUDICIALLY DETERMINED TO VIOLATE THE REQUIREMENTS OF ERISA?

WHETHER THE AWARD OF ATTORNEY'S FEES IN AN ERISA CASE WHICH BENEFITS A SUBSTANTIAL GROUP OF PLAN PARTICIPANTS IS AN ABUSE OF DISCRETION?

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents, plaintiffs below, are participants in the pension plan of the International Brotherhood of Teamsters Local No. 710 Pension Fund ("the Plan").

The Plan prior to February 1, 1976, ("the pre-ERISA Plan") provided retirement benefits to participants who completed 20 years of service. Normal retirement benefits were paid to participants who retired at the normal retirement age of 57. Early retirement benefits were provided to participants who retired between ages 47 and 57. Deferred vested benefits at age 65 were provided to participants who terminated employment before age 50.

On April 21, 1976, the defendant Trustees amended the Plan ("the Amended Plan") retroactively to February 1, 1976. In the Amended Plan, the Trustees redesignated age 57 as the "Regular Retirement Age" and designated age 65 as the "Normal Retirement Age." By using the newly defined normal retirement age of 65 for determining benefits under the Amended Plan, the Trustees deprived participants who had been enrolled in the pre-ERISA Plan of the following ERISA rights and protections:

(a) The right to have actuarial reductions based upon age 57 rather than age 65 for benefits commencing prior to age 57;

(b) The right to have benefits commence at age 57 rather than at age 65; and

(c) The right to pre-retirement survivor benefits between ages 47 and 57 rather than between ages 55 and 65.

Under the pre-ERISA Plan, participants with at least 20 years of service were entitled to receive, depending upon their respective ages, either (a) $450 at age 57, (b) an amount which had been actuarially reduced from $450 if benefits commenced prior to age 57; or (c) $250 at age 65. In the case of participants who had completed the requisite 20 years of service prior to the amendment of the Plan, the Amended Plan disregards these benefits in calculating participants' accrued benefits. The Amended Plan also does not provide pro rata credit for the accrual of benefits by participants who are employed part-time.

Finally, the Amended Plan changed the method of calculating early retirement benefits and the benefits of vested participants who terminate employment prior to

age 50. Under the formula set forth in the Amended Plan, benefits are less for participants who early retire and vested participants with 20 years of service than the benefits provided by the pre-ERISA Plan.

Pursuant to 29 U.S.C. §1132, plaintiffs filed an Amended Complaint alleging that defendants breached their fiduciary duties by unlawfully reducing benefits already earned and depriving participants of benefits mandated by ERISA in amending the Plan contrary to law and the Plan itself. On February 2, 1979, the District Court certified the following class:

> All persons who are now, or who were as of February 1, 1976 members of Local 710 of the International Brotherhood of Teamsters and who have accepted early retirement or intended to do so under the terms of the Pension Plan of said Local 710 and whose early retirement benefits were or will be affected by the amendments to the Plan made as of February 1, 1976.

In its class certification opinion the District Court specifically determined that plaintiffs had standing to bring the lawsuit pursuant to 29 U.S.C. §1132.

More than a year after the filing of plaintiff's complaint, the Trustees further amended the Amended Plan effective July 1, 1979, to provide that participants could elect to receive the benefits upon early retirement or deferred vested retirement provided by the pre-ERISA Plan.

The District Court, by decisions on July 24, 1980, and October 30, 1980, on cross motions for summary judgment, granted defendants' motion and dismissed plaintiffs' claim that age 65 had been improperly designated as the normal retirement age in the Plan. Plaintiffs

appealed this conclusion. The District Court also granted plaintiffs' motion and ordered that the Amended Plan must be reformed to provide proper benefit accruals for service before 1976 and for part-time service. Because the Amended Plan had been amended to provide for the early retirement and deferred vested benefits about which plaintiffs had complained, further amendments were unnecessary, but the District Court enjoined defendants from acting to reduce such benefits. The court also denied various procedural defenses advanced by defendants, again finding that plaintiffs had the requisite standing. Defendants appealed the portions of the summary judgment orders adverse to them.

Defendants also appealed the Disrtict Court's orders of February 4 and 17, 1981, awarding plaintiffs attorneys' fees. Plaintiffs also appealed the fee award to the extent that the fee was reduced by reason of the decision on the retirement age issue.

The Court of Appeals for the Seventh Circuit on March 8, 1982, affirmed the District Court's decision in favor of plaintiffs on the various procedural issues, the part-time credit issue and the award of fees. The Court of Appeals also affirmed the decision in favor of defendants on the normal retirement issue and reversed the pre-1976 benefit accrual decision. The injunction was removed in the absence of evidence that the Trustees would deprive participants of the benefits now set forth in the Amended Plan. Each party was ordered to bear its own appeal costs.

Cross-petitions for rehearing were denied on April 7, 1982. Plaintiffs timely filed a Petition for a Writ of Certiorari seeking review of the decisions on the normal retirement age and pre-ERISA benefit accrual issues.

ARGUMENT

Respondents, plaintiffs below, respectfully submit that the questions presented for review in the Petition for a Writ of Certiorari filed on behalf of the International Brotherhood of Teamsters Local No. 710 Pension Fund and the Trustees of the Fund, defendants below, do not warrant further consideration by this Court for the reasons set forth below.

I

IN AN ACTION FOR BREACH OF FIDUCIARY DUTIES UNDER ERISA, PLAN PARTICIPANTS HAVE STANDING TO CHALLENGE A PLAN PROVISION WHICH HAS BEEN JUDICIALLY DETERMINED TO VIOLATE THE REQUIREMENTS OF ERISA.

This case arose as a result of a complaint by plaintiffs as Plan participants that defendants breached their fiduciary duties imposed by Title I of ERISA in amending the Plan in various respects contrary to the provisions of ERISA and the Plan itself. Among the specific allegations was the complaint that Section 4.04 of the Plan, dealing with the crediting of service, violated the requirements of ERISA.

Plaintiffs have maintained, and both the District Court and the Court of Appeals have held, that the Plan violates the part-time credit requirements of ERISA and must be reformed. Defendants' petition does not seek review of this ruling. (Def. Pet. p. 3). Defendants assert only that plaintiffs lack standing to challenge the invalidated part-time service credit provision of the Plan.

Plaintiffs' standing to sue is provided by Section 502(a) of ERISA, 29 U.S.C. Section 1132(a), which provides in relevant part:

> "A civil action may be brought — (1) by a participant or beneficiary — (B) to recover benefits due to him under the terms of his plan, or to clarify his rights to future benefits under the terms of the plan;
>
> (2) . . . by a participant . . . for appropriate relief under Section 409 [pertaining to relief for breaches of fiduciary responsibilities];
>
> (3) by a participant . . . to enjoin any act or practice which violates any provision of this title [I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

As decided by the District Court in its opinion certifying this matter as a class action:

> "Defendants also contend that plaintiffs lack standing because they have not yet been damaged by the amendments made on February 1, 1976. However, they are given the right to sue by Section 1132(a)(3) of E.R.I.S.A. See *Mulqueeny* v. *National Commission On the Observance of International Women's Year*, 549 F.2d 1115, 1120, n.15. (7th Cir. 1977)."

Plaintiffs' standing was reaffirmed by the District Court in its decision on cross-motions for summary judgment. (Def. App. E, at p. 29a).

Since plaintiffs are admittedly Plan participants, their standing is self-evident. By statute, participants have standing to enjoin acts or practices which violate ERISA and to redress such violations or to enforce any provision of ERISA. Defendants seek to deny plaintiffs this right. Standing to bring suit based upon rights created by statute is clearly recognized. *O'Shea* v. *Littleton*, 414 U.S. 488, 493 n.2 (1974); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). See *Trafficante* v. *Metropolitan Life*

Ins. Co., 409 U.S. 205, 212 (1972) (White, J., concurring); *Hardin* v. *Kentucky Util. Co.*, 390 U.S. 1, 6 (1968).

Both the District Court and the Court of Appeals have determined that the part-time credit provision of the Plan does not satisfy the requirements of ERISA. The District Court specifically held "that if the plan amendments violate E.R.I.S.A. requirements, then defendants' official actions [in connection with the adoption and implementation of such amendments] are arbitrary and capricious as a matter of law." (Def. App. E, at p. 29a). Plaintiffs have standing to sue to correct such breaches of fiduciary duties by their Plan fiduciaries. Moreover, unless the Plan is amended to comply with ERISA, it is not a "qualified plan" and all participants, including plaintiffs, will suffer adverse federal income tax consequences from the loss of its "qualified" status.

Finally, contrary to the suggestion that the part-time service credit provision does not apply to plaintiffs, the fact is that it has applied every year that plaintiffs have been participants. The contested provision (Section 4.04 of the Plan) provides that:

> "A Participant shall be credited with Future Pension Credits on the basis of his weeks of work in Covered Employment for which Employer Contributions were paid in accordance with the following schedule:
>
> | Weeks Engaged In Covered Employment During Calendar Year | Future Pension Credits |
> |---|---|
> | Less than 20 weeks | None |
> | 20 but less than 35 weeks | ½ year |
> | 35 weeks or more | 1 year" |

Each year, contrary to law and the opinions of the courts below, plaintiffs became entitled to only one-half of a year's credit under the Plan until they worked thirty-five (35) weeks. At that time, they became entitled to a full year's credit under the Plan. Therefore, each year, until plaintiffs and all other participants complete 35 weeks of work, the illegal provision applies.

Plaintiffs' standing is thus provided not only by statute but also by actual applicability of the contested provision to plaintiffs. Further, plaintiffs will suffer economic detriment by virtue of the loss of the "qualified" status of the Plan if it is not amended to correct plaintiffs' complaint.

II

THE AWARD OF ATTORNEY'S FEES IN AN ERISA CASE WHICH BENEFITS A SUBSTANTIAL NUMBER OF PLAN PARTICIPANTS IS NOT AN ABUSE OF DISCRETION.

Defendants assert erroneously that the award of attorney's fees in this ERISA case raises an issue which this Court has already agreed to decide. In support, defendants refer to *Hensley* v. *Eckerhart*, No. 81-1244, *cert. granted*, 50 U.S.L.W. 3695 (March 1, 1982) and *Ashcroft* v. *Planned Parenthood Ass'n of Kansas City, Missouri, Inc.*, No. 81-1623, *cert. granted*, 50 U.S.L.W. 3934 (May 24, 1982), and assert that certiorari has been granted in *Hensley* and *Ashcroft* to resolve a conflict which has arisen among the Courts of Appeals. (Def. Pet. pp. 14-15, n. 12-13).

Neither *Hensley, Ashcroft,* nor any of the cases cited by defendants as illustrative of the conflict among the circuits, involve ERISA. All of these cases involve the

Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988) or Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000a-5(k)). Under both Civil Rights Acts, attorney's fees may only be awarded to the "prevailing party". Each of the cases cited involves the calculation of attorney's fees under the "prevailing party" standard.

Unlike the Civil Rights Acts, 29 U.S.C. §1132(g), Section 502(g) of ERISA, does not condition attorney's fees upon prevailing in the litigation. Rather, it provides only that:

> "In any action under this title [I of ERISA] by a participant, beneficiary, or a fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Cases interpreting the "prevailing party" standard under the Civil Rights Acts are inapposite to ERISA.

Contrary to defendants' assertions, the case law regarding the proper standards for awarding attorney's fees in ERISA cases is clear and consistent. See, e.g., *Iron Workers Local 272* v. *Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Hummell* v. *S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978).

Indeed, this case law is so clear and consistent that defendants have conceded at p. 8 of their Petition that:

> "The Court of Appeals agreed that Plaintiffs were entitled to an award under §502(g) of ERISA (*a point which we do not here contest*)." (Emphasis added).

Having conceded that an award of attorney's fees is appropriate, defendants contest only the amount of the fee award. As the Court of Appeals stated:

> "Finally, we consider the amount of the award. The district court carefully and thoroughly analyzed the complexity and unsettled nature of the questions involved, the expertise of the attorneys, and the time expended to arrive at the hourly rate of $100 and $125 and the multiplier of two. We adopt the district court's analysis and conclusion with respect to the amount awarded and, as a consequence, need not repeat it." (Def. App. A, at p. 18a).

The Court of Appeals' adoption of the District Court's careful analysis was proper. The District Court's analysis was based upon the Court of Appeals' prior decision in *Waters* v. *Wisconsin Steel Works of International Harvester*, 502 F.2d 1309, 1329 (7th Cir. 1978), *cert. denied*, 425 U.S. 997 (1975), which adopted the standards for fee awards set forth in Disciplinary Rule 2-106 of the American Bar Association Code of Professional Responsibility.

Disciplinary Rule 2-106 indicates that the factors to be considered as guides in determining the reasonableness of a fee include the following:

> "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.
>
> (6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent."

The District Court was presented with a fee petition including detailed time records for all attorneys performing services on behalf of plaintiffs, the transcript of defendants' deposition of plaintiffs' counsel, affidavits of other attorneys with expertise in the field, and three legal memoranda. Such materials enabled the District Court to exercise properly its discretion in a manner consistent with the *Waters* guidelines. Defendants, in fact, argued to the District Court that the *Waters* guidelines were appropriate. Both the District Court and Court of Appeals agreed. Defendants do not now have cause for further complaint meriting this Court's attention.

Predictably, defendants seek to minimize the merits of plaintiffs' efforts on behalf of the class. It is uncontested that the additional benefit accruals for part-time employment which plaintiffs have won represent aggregate additional benefits to participants amounting to several millions of dollars. Moreover, the right of participants to receive the greater early retirement benefits and deferred vested benefits under the pension plan prior to 1976 had been omitted from both the Plan and the summary plan description. As a result of plaintiffs' efforts, these provisions are now clearly set forth in the Plan and the summary plan description.

Various procedural aspects of ERISA litigation have also been clarified as a result of plaintiffs' efforts. Even with respect to the two issues (of first impression) which plaintiffs lost and for which a separate petition is pending before this Court, the applicable law has become clearer. As the Court of Appeals stated:

> "Nevertheless, we believe that this award is justified because the litigation benefitted a substantial group of Fund participants and that the award is necessary to enable aggrieved parties to invoke the power of the court when pre-ERISA benefits are in danger. The award of fees is not an abuse of discretion." (Def. App. A, at p. 18a).

Finally, defendants misrepresent the District Court's references to the size of the pension fund's assets and the fund's payment of legal fees in excess of $1,000,000 to its own attorneys. The factors about which defendants complain were not considered by the District Court in connection with the determination of the amount of the fee as suggested by the defendants. Rather, *after* determining the amount of the attorney's fee award, the District Court stated:

> "This brings us to the final question of who should be responsible for payment of plaintiffs' fees. Defendants contend that whatever fees are paid must come out of the finite amount of the pension fund. If the fund were not sufficient to pay all the benefits, then defendants' contention that the fees must come out of benefits to be paid to persons not affected by our decision would be more plausible. However, plaintiffs point out that the fund now amounts to over $222,500,000 and that the plan's assets increased by more than $27 million over the payments of benefits during the fiscal year ending January 31, 1980. Finally, the fund itself paid $1,158,861 in attorneys fees for fiscal year ending January 31, 1980, compared to which the fees for plaintiffs' attorneys would be a relatively small burden." (Def. App. G, at p. 45a).

Plaintiffs took no position regarding the source of payment of the attorney's fees. If the defendant trustees

desire to pay the fees from their own funds, plaintiffs have no objection.

In sum, defendants have conceded that a fee award is appropriate; the District Court and the Court of Appeals carefully reviewed the facts supporting the award of attorney's fees; and there is substantial evidence in support of their decision. Both courts in fact followed the guidelines suggested by defendants themselves. Further, the matters pending before the Court in *Hensley* and *Ashcroft* involve a statutory interpretation which is not applicable to either ERISA in general or this case in particular. Therefore, there is no conflict among the courts regarding the applicable standards to be applied.

CONCLUSION

For the reasons indicated, the Petition for a Writ of Certiorari of defendants-petitioners should be denied.

Respectfully submitted,

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